

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAY DEAN MCGUIGAN,

Defendant-Appellant.

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UNPUBLISHED

May 19, 2015

No. 320714

Oakland Circuit Court

LC No. 2013-247355-FH

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of failure to stop on the direction of police (fleeing and eluding) in the second-degree, MCL 257.602a(4), larceny of more than \$1,000 and less than \$20,000, MCL 750.356(3)(a), and reckless driving, MCL 257.626. Defendant was sentenced to 9 to 40 years for fleeing and eluding in the second-degree, 3 to 20 years for larceny, and 93 days for reckless driving. For the reasons set forth in this opinion, we affirm the sentence of defendant.

I. BACKGROUND.

This appeal arises from a series of events which occurred on August 23, 2013. On that date, at approximately 10:00 a.m., Deputy Thomas Poulin of the Oakland County Sheriff's Department, was in his squad car which was equipped with a working camera. Poulin was in Rochester Hills on Tienken Road, which was partially closed for construction. As a result of the construction, the road was no longer covered in asphalt but was dirt and gravel. Poulin and other Oakland County officers were patrolling the area because they received several reports that individuals were driving through Tienken Road at high rates of speed.

After a routine stop, unrelated to defendant's case, Poulin witnessed a car driving on Tienken Road in what he described as "Dukes of Hazard" style: "It came off the higher paved area onto the gravel area, fishtailing, throwing stones, kicking up dust." At the same time, near the vehicle that was travelling at a high rate of speed, Poulin witnessed a construction worker pointing toward the vehicle. He along with his partner Deputy Ashley, who followed behind him, pursued the driver of the car with lights and sirens activated. They chased the vehicle for a significant distance around curvy roads and witnessed defendant cross several double yellow lines to avoid being stopped. After defendant finally came to a stop, he exited the vehicle and ran, but was unable to scale a fence. Defendant thereafter surrendered to police.

Before defendant was sentenced, a PSIR was completed. The PSIR revealed that defendant had nine previous felony convictions and three previous misdemeanor convictions. In particular, defendant's conviction history revealed the following:

1. On March 16, 1989, defendant pleaded guilty to obstruction of a police officer. He served no time for this conviction and only paid a \$100 fine.
2. On July 25, 1989, defendant pleaded guilty to receiving and concealing stolen property of a value of more than \$100. He received three years' probation for this offense.
3. On June 1, 1989, defendant pleaded guilty to receiving and concealing stolen property over \$100. He received three years' probation for this offense.
4. On February 27, 1990, defendant pleaded guilty to receiving and concealing stolen property under \$200 (misdemeanor). He served six months in the Macomb County Jail.
5. On January 7, 1991, defendant pleaded guilty to larceny over \$100, as a second habitual offender. He was sentenced to six months to 7½ years in the Michigan Department of Corrections.
6. On June 24, 1991, defendant pleaded nolo contendere to one count of fleeing a police officer causing injury, one count of receiving and concealing stolen property over \$100, and one count of felonious driving. Defendant was sentenced to one to four years for receiving and concealing stolen property over \$100, two to five years for fleeing a police officer causing injury, and one to two years for felonious driving.
7. On April 13, 2000, defendant was found guilty by a jury of one count of fleeing a police officer in the second degree and one count of felonious assault. Defendant was sentenced to 2½ to 15 years for fleeing a police officer and three to 15 years for felonious assault.
8. On October 7, 2005, defendant pleaded nolo contendere to one count of felonious assault and one count of OWI. Defendant was sentenced to two to 15 years for felonious assault and 65 days for OWI.

The trial court, relying on the PSIR, issued its decision:

I have reviewed the report and note you have nine prior felonies and three misdemeanors . . . .

This offense involved you driving in a dangerous manner to avoid the police. Your speed was upward of 90 miles an hour. The public was placed at tremendous risk.

You had a construction saw that was stolen from a work site in your car.

And having watched that video, I've got to say it was both riveting and terrifying what the police officers had to go through and what you led them on.

It is the sentence of the Court on Count 1, fleeing and eluding second degree, habitual fourth: nine to 40 years, Michigan Department of Corrections; jail credit, 173 days.

Larceny between 1,000 and twenty—and less than twenty thousand dollars, habitual fourth: three to 20 years; credit, 173 days. Reckless driving: 93 days, credit 173 days.

All counts are concurrent.

Defendant did not object to any of the trial court's findings or the sentencing. This appeal then ensued.

According to a February 13, 2014 corrected version of defendant's Sentencing Information Report (SIR), Prior Record Variable (PRV) 1 was scored at 50, PRV 2 was scored at 30, PRV 5 was scored at 10, and PRV 7 was scored at 10. Accordingly, the total PRV score was 100, which placed defendant in PRV Level F. Defendant was scored 10 points for Offense Variable (OV) 9, 10 points for OV 17, and 10 points for OV 19. This gave defendant an overall OV score of 30 and placed defendant at OV Level III. The SIR provided that defendant was to receive a minimum guideline range of 19 years to 114 years, to be served concurrently (SIR).

## II. ANALYSIS.

On appeal, defendant contends that the trial court committed plain error in scoring PRV 5 and OV's 9 and 19. We note that defendant includes an ineffective assistance of counsel argument in his discussion of each PRV and OV that he challenges on appeal. However, defendant does not mention ineffective assistance in his statement of the issue presented for appeal, nor does he fully analyze the questions in the body of the brief. Ordinarily, no point will be considered which is not set forth in the statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Accordingly, this Court will not consider defendant's ineffective assistance of counsel claims.<sup>1</sup>

Defendant did not preserve the guidelines scoring challenges with an objection at sentencing, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), or in a proper motion

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<sup>1</sup> Additionally, because the trial court did not err in any of its rulings on the scoring issues raised in this appeal, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Smith v Spisak*, 558 US 139, 150; 130 S Ct 676; 175 L Ed 2d 595 (2010); *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

for resentencing or a motion for remand filed in this Court, *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013), citing MCL 769.34(10). We may nonetheless review an unpreserved scoring issue for plain error affecting substantial rights. *Kimble*, 470 Mich at 312. To meet this standard, defendant must show that a plain error, an error that was clear or obvious, occurred, and that the error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763. 597 NW2d 130 (1999). This generally requires showing a plain error that affected the outcome of the proceedings. *Id.* "Reversal is warranted only when the . . . error resulted in the conviction of an actually innocent defendant or . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Loper*, 299 Mich App at 457, quoting *Carines*, 460 Mich at 763.

First, defendant contends that PRV 5 was incorrectly scored 10 points. Pursuant to MCL 777.55(1)(c), PRV 5 should be scored 10 points if "[t]he offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1)(d) provides that PRV 5 should be scored five points if "[t]he offender has 2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications." A prior misdemeanor conviction is defined in MCL 777.55(3)(a) as "a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed."

Defendant contends that he had no juvenile criminal history and only two prior misdemeanor convictions, consisting of a 1988 conviction of obstruction of a police officer and a 1990 conviction of receiving and concealing stolen property under \$200. However, defendant was convicted, after pleading nolo contendere, of operating a vehicle while intoxicated or impaired with the presence of a controlled substance, MCL 257.625, which is a misdemeanor. Thus, the trial court's scoring of PRV 5 at 10 points was correct because defendant had been convicted of three prior misdemeanors.

Next, defendant argues that OV 9 was improperly scored 10 points. Pursuant to MCL 777.39, OV 9 should be scored 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." Defendant's primary argument against the scoring of OV 9 is that Oakland County Deputy Thomas Poulin, although he testified about the chase, never testified "that anyone had been placed in danger of injury or loss of life, or loss of property."

When scoring OV 9, one should "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). In *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004), our Supreme Court found that while only one person was actually robbed in that case, another person, "who was standing nearby and responded to [the robbery victim's] call for help, was also placed in danger of injury or loss of life by the armed robbery." (Internal quotations and footnote omitted.) Furthermore, this Court recently held, "A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *People v Gratsch*, 299 Mich App 604, 624; 831 NW2d 462 (2013), vacated in part on other grounds, 495 Mich 876; 838 NW2d 686 (2013).

At defendant's trial, sheriff's deputy Poulin testified that he was the primary officer involved in the chase of the vehicle defendant was driving. However, Poulin also testified that his partner, Deputy Ashley, followed behind him during the chase. Poulin explained that Ashley was part of the chase, but sometimes the two officers' routes differed: "[Ashley] didn't follow me through the factory area; and then there's a point at—at Adams Road he got caught in traffic. So he was—There was a big gap at that point." Furthermore, Poulin also testified that parts of the chase involved speeds of "100 miles an hour" or more.

Because "victim" is defined broadly as "each person who was placed in danger of physical injury or loss of life or property as a victim," MCL 777.39(2)(a), there were at least two identified victims of the chase, Poulin and Ashley. Thus, the trial court correctly scored OV 9 at 10 points.

Finally, defendant argues that OV 19 should have been scored zero points rather than 10 points. Pursuant to MCL 777.49(c), OV 19 should be scored 10 points when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(d) provides that OV 19 should be scored zero points when "[t]he offender did not . . . interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force." OV 19 applies to interactions with police officers. In fact, our Supreme Court has found that interference with the administration of justice encompasses more than the actual judicial process and that "the police are an integral component in the administration of justice regardless of whether they are operating directly pursuant to court order." *People v Smith*, 488 Mich 193, 201-202; 793 NW2d 666 (2010) (internal quotations omitted). Further, "[t]he administration of justice process, including the actual judicial process, is not commenced until an underlying crime has occurred, which invokes the process." *Id.* at 202 (internal quotations omitted). This Court has held that "[f]leeing from the police can easily become 'interference with the administration of justice' particularly where . . . there was an effective command for the vehicle stop, in the form of the police activating their lights and sirens." *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474 (2013), vacated in part on other grounds by 495 Mich 876; 838 NW2d 687 (2013).

The evidence from defendant's trial clearly demonstrated that defendant led Poulin and Ashley on a high speed chase. Poulin activated his siren and overhead emergency lights in an attempt to stop defendant's vehicle and then continued using them throughout the chase. Even after the lights and sirens were used, defendant continued the chase and attempted to drive away from Poulin and Ashley at very high speeds. Defendant's actions clearly reveal that he fled from the police contrary to their activation of sirens and overhead lights. Engaging in this activity warrants assessing 10 points for OV 19. *Smith*, 488 Mich at 202. See also, *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Thus, the trial court did not err in assessing 10 points for OV 19.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Stephen L. Borrello